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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-72-1004

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK and VELVET BROWN, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 18, 1973

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Bethlehem Steel Corporation ("Bethlehem") petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (B-1)* and that of the district court (B-2) are not yet reported. The decisions

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* Citations to Appendix A are to page number within appendix (*e.g.* A-8) while citations to Appendices B and C are to the appendix section and, where appropriate, to the page number of the document reproduced therein (*e.g.* B-1 at 654).

of the court of appeals and the district court and the Amended Decree in the prior case entitled *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir. 1971), *modifying*, 312 F. Supp. 977 (W.D.N.Y. 1970), are set forth in Appendix C.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 3, 1972. Bethlehem's timely petition for rehearing and suggestion for rehearing in banc were denied on December 4 and December 12, 1972, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In December 1967, the United States commenced a suit to enjoin Bethlehem "from engaging in any racially discriminatory employment practice" at its Lackawanna, New York, Plant. On October 14, 1971, permanent injunctive relief enjoining such discrimination and benefiting those black employees who had been affected by such discriminatory practices was entered in accordance with the decision of the Court of Appeals for the Second Circuit.

The questions presented are:

1. Is a group of black employees at the Lackawanna Plant entitled to maintain a subsequent action on the same facts to obtain injunctive relief in addition to the comprehensive relief already obtained for them by the United States?

2. Is that group of black employees entitled in a subsequent action on the same facts to obtain preliminary injunctive relief which is inconsistent with the relief fashioned by the decision of the court of appeals in the Government's action?

Statutes

The statutory provisions involved, Sections 703, 706 and 707 of Title VII of the Civil Rights Act of 1964 (Pub. L. No. 88-352, 78 Stat. 255 [42 U.S.C. § 2000e-2, 5 and 6]), are reproduced in relevant part in Appendix A together with subsequent amendments thereto (86 Stat. 103 (1972)).

Statement of the Case

This action is brought by six black employees at Bethlehem's Lackawanna, New York, Plant (the "Plant") pursuant to Section 706 of the Civil Rights Act of 1964 (A-1). The district court denied respondents' motion for a preliminary injunction on the ground that it was precluded from granting the relief sought. The court of appeals reversed, but stayed its mandate pending application for a writ of certiorari.

Respondents are members of the class of beneficiaries of the far-reaching Amended Decree (C-3) entered at the direction of the court of appeals in *United States* v. *Bethlehem Steel Corp.* (*United States* v. *Bethlehem*) (C-1), a suit brought by the United States to vindicate the rights of employees under Title VII of the Civil Rights Act of 1964 by enjoining Bethlehem from engaging in racially discriminatory employment practices. Respondents' motion for a preliminary injunction seeks relief which extends beyond the limits of the relief obtained for them in *United States* v. *Bethlehem* and which is inconsistent with the decision and Amended Decree of the court of appeals in that case.

1. *Title VII of the Civil Rights Act of 1964.*

Section 703* of Title VII provides:

> "It shall be an unlawful employment practice for an employer—

* All references to sections of Title VII are to the original provisions under which respondents brought their action unless otherwise indicated.

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (A-1).

As enacted in 1964, Title VII created the Equal Employment Opportunity Commission (EEOC) and charged it with the duty of investigating charges filed with it alleging discriminatory employment practices in violation of Section 703 and of attempting to eliminate "any such unlawful employment practice by informal methods of conference, conciliation, and persuasion" if it found that there was reasonable cause to believe the charge was true (§ 706(a); A-2). Section 706(e) provided that if such conciliation efforts proved unsuccessful the aggrieved employee could bring a civil action against the employer to enforce the rights granted to him by Section 703 (A-2). Respondents instituted this action under Section 706(e).

Section 707(a) provided (and still provides) an additional enforcement mechanism by authorizing the Attorney General to bring a civil action whenever he has reasonable cause to believe that an employer "is engaged in a pattern or practice of resistance to the full enjoyment" of those rights granted by Section 703 (A-3). Pattern-or-practice suits instituted by the Attorney General under Section 707 seek enforcement of the same rights and interests of individual employees protected by EEOC action and individual suits, but are addressed to alleged denials of those rights which are repeated, routine or of a generalized nature.

The Equal Employment Opportunity Act of 1972 substantially revises the enforcement scheme of Title VII.

Although it confers authority on the EEOC to bring civil actions on behalf of individuals aggrieved by discriminatory practices, suits by individuals remain restricted to instances where the EEOC has failed to act (§ 706(f)(1); A-5). Subject to concurrent jurisdiction with the Attorney General for two years, the 1972 Act makes the EEOC the exclusive enforcement agency for pattern-or-practice suits under Section 707 (§ 707(c),(e); A-8).

2. *United States* v. *Bethlehem.*

In December 1967, the Attorney General commenced a pattern-or-practice suit under Section 707(a) to enjoin Bethlehem from, *inter alia,* continuing discriminatory assignment of black employees to undesirable jobs in predominantly black departments and to provide a remedy for those affected by such practices. The United Steel Workers of America and several of its locals ("the Unions") were also made defendants. Virtually all of the material facts, including the facts of prior discrimination, were stipulated to by the parties. Only the appropriateness of certain aspects of the Government's proposed remedy were litigated.

The relief sought and obtained by the United States provided each member of the "affected class"* an opportunity to reach his rightful place in the labor force at the Plant. The Government contended that, although discriminatory practices had ceased by October 1967, affected class members were locked into the predominantly black departments by provisions of the existing collective bargaining agreement. Under that agreement an employee who trans-

* The "affected class" was defined as all black employees hired prior to October 1, 1967 (the date on which the discriminatory practices charged by the Attorney General were found to have ceased), and originally assigned to one of eleven predominantly black departments (C-3 at 1). A substantial number of black employees are not members of the affected class and in many instances have interests adverse to the members of that class.

ferred to another department in the Plant was required to begin at the bottom of the line of progession in his new department or seniority unit, thereafter accumulating new seniority in that department. Subsequent promotion was determined on the basis of "department" or "unit" seniority—as opposed to "plant" seniority. Therefore, the loss of seniority and earnings following such a transfer might deter a member of the affected class from transferring to departments he deemed more desirable.

In order to remove that supposed deterrent to transfer the United States sought to establish an opportunity for each member of the affected class to transfer and to carry over his previously accumulated plant seniority and previous earnings base to his new job. Under its proposal subsequent promotion would be determined by an employee's total plant, not unit, seniority. The district court denied that relief and the court of appeals reversed and directed entry of an Amended Decree incorporating the requested relief (C-3 at 2).

Among the critical issues raised by the Government's proposed remedy were the system to be applied for determining recall from layoff and the type of vacancy to which transfer by affected class members would be permitted. At the trial and in its brief on appeal, the Government urged that members of the affected class who transferred should be permitted to use their plant seniority *for all purposes*, including recall from layoff, and that they be permitted to transfer to any vacancy at the bottom of any line of progression in the Plant.

Bethlehem and the Unions pointed out in their brief on appeal that permitting transferees to use plant seniority for all purposes, including recall from layoff, would result in transferees being returned to work from layoff ahead of incumbent employees with less plant seniority but greater experience in the department. This proposed acceleration of the advancement of transferees to upper-

level positions in their new departments before they had an opportunity to acquire sufficient training and experience created a situation rife with possibilities for serious industrial accident and posed a serious threat to the safety and efficiency of operations of the Plant.

The probable frequency of transfers and the likelihood that they would result in such a loss of safety and efficiency were increased by the failure of the original Government proposal to distinguish between permanent vacancies and temporary "vacancies" caused by layoffs due to breakdowns, temporary reduction in demand for certain products, or absence due to vacation or illness. When a force reduction occurs, employees having the greatest seniority in a unit are demoted to lower level jobs in the line of progression while less senior employees holding those jobs are laid off. On a subsequent recall, senior employees return to their former jobs and employees who had been laid off entirely are recalled to jobs at the bottom of the line of progression. Thus, as experienced employees are recalled in such a situation, a transferee working in an entry level job would automatically move up to an advanced position by virtue of his greater plant seniority despite his lack of experience in the new unit. Permitting transfers to such temporary "vacancies" subject to being filled by recall is, therefore, equivalent to permitting transfers by inexperienced employees directly to positions in the middle of lines of progression.

In light of those consequences, the United States modified its request at the eleventh hour. In its reply brief to the court of appeals it asserted, *for the first time*, that it was asking only that affected class members be permitted to transfer to permanent vacancies caused by death, retirement or transfer of incumbent employees and that employees recalled from layoff should return to the same relative positions they occupied prior to layoff. The court

of appeals accepted those limitations as disposing of the substantial safety and efficiency problems raised by Bethlehem and the Unions and incorporated them in its opinion and Amended Decree (C-1 at 664, 666; C-3 at 2, para. 5(a)(4)).

3. *Williamson* v. *Bethlehem.*

This case was instituted less than two weeks after the Amended Decree in *United States* v. *Bethlehem* was entered.

It is brought on behalf of a purported class of all "black persons who have been, are employed or might be employed by Bethlehem . . . and who have been and continue to be or might be adversely affected by the practices complained of" (Complaint, para. II). The practices complained of are identical to those set forth in the Government's complaint, with the single addition that Bethlehem is "[r]eturning black employees from layoff on a discriminatory basis." (Complaint, para. VII).

Respondents immediately moved for a preliminary injunction. They neither presented new evidence nor made additional allegations in support of their motion, but relied exclusively on the prior record in *United States* v. *Bethlehem.*

Their motion for a preliminary injunction demands that all black employees on layoff be recalled, based on their plant seniority, to any entry level vacancy in any department or seniority unit subject to being filled by an incumbent employee in layoff status. Such "vacancies" are, of course, exactly the kind of vacancies to which the court of appeals had declined to permit transfer. The injunction sought by respondents would therefore provide a method of transfer which would permit untrained black employees accelerated access to advanced positions in new units thereby displacing incumbent employees with the same deleterious effect on safety and efficiency produced by the Govern-

ment's original proposal. It is in substance the very relief from which the United States withdrew at the last moment and which the court of appeals indicated in *United States* v. *Bethlehem* would not be appropriate.

The district court denied respondents' motion on the grounds that "the relief sought by plaintiffs in the present motion for a preliminary injunction was considered by the Court of Appeals [in *United States* v. *Bethlehem*] and . . . such relief is precluded by its opinion, order and subsequent amended decree entered by this court" (B-2 at 6-7).

The court of appeals reversed and remanded for further proceedings, finding that (1) "[t]he question of recall from layoff . . . was not decided" in *United States* v. *Bethlehem* (B-1 at 321) and (2) "[f]or purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it . . . nor have interests such as to be in privity with the Attorney General" (B-1 at 323). Accordingly, the court below concluded that "this case is one which properly seeks an extension of the relief sought and obtained in the earlier case" (B-1 at 324).

Reasons for Granting the Writ

Bethlehem urges that this Court grant a writ of certiorari and reverse the court of appeals because

> (1) failure to accord finality to a prior judicial decision under Title VII against the same defendants on the same facts will have serious adverse effects on the continued efficacy of Title VII as a device for the elimination of discriminatory employment practices;
>
> (2) respondents are precluded by principles of res judicata and collateral estoppel from maintaining

an action to obtain relief in addition to or inconsistent with that obtained for them in *United States* v. *Bethlehem*; and

(3) in any event respondents are precluded from obtaining relief which is in conflict with that directed by the court of appeals in *United States* v. *Bethlehem*.

1. The holding of the court below that a final decree obtained by the United States under Title VII does not bar a subsequent action by the individuals on whose behalf the decree was obtained presents an issue of fundamental importance to the administration of Title VII and to the effective development of remedies against employment discrimination which has not been, but should be, settled by this Court.

The decision below sanctions a proliferation of litigation that will inevitably defeat rather than vindicate the remedial purposes of Title VII. By denying finality to the judgment obtained in a Government action on behalf of employees, the decision invites the endless relitigation of issues.

The threat of relitigation will seriously impair the efficacy of the conciliation machinery established by Section 706 and will remove any incentive for employers to negotiate the settlement of suits brought under Sections 706 or 707. Furthermore, the decision below will necessarily engender even greater confusion than now exists with regard to the deference that should be accorded prior decisions of state, federal and private agencies authorized to determine employment discrimination questions.

Nothing in Title VII supports the conclusion of the court below that respondents' rights were not represented by the United States and that Congress intended to permit a never-ending series of challenges to final judgments under Title VII. The court of appeals sought to find such statutory authority for multiple suits by noting that the 1972

amendments to the Act authorize individuals to intervene in civil actions brought by the EEOC or the Attorney General, concluding that "presumably individuals not party to the Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General" (B-1 at 324). That interpretation of the amendments ignores the clear language of amended Section 706 which provides that an individual civil suit may be brought only by an individual who has filed a charge (or on whose behalf a charge has been filed) with the EEOC and *only after* the EEOC has failed to bring a suit or to achieve conciliation (§ 706(f)(1); A-5).

In fact, despite the contrary presumption of the court of appeals, the 1972 amendments to Title VII actually clarify the congressional purpose to have all issues resolved in a single proceeding. Among the changes adopted by the amendments are:

First, they limit an employee's right to sue on his own behalf by (a) providing that in investigating a charge of discrimination, the EEOC "shall accord substantial weight to final findings and orders" of state and local authorities —thus reducing the possibility that an employee who has obtained less than all the relief he sought from a state court or agency may secure additional or inconsistent relief from the EEOC (§ 706(b); A-4); (b) authorizing the EEOC to bring suit on the employee's behalf (§ 706(f)(1); A-5); and (c) limiting the employee's right to sue to situations where the EEOC (i) dismisses his charge, (ii) does not sue within 180 days, or (iii) has not entered into a conciliation agreement to which the employee is a party (*ibid.*).

Second, the fact that the amendments provide the employee an explicit statutory right to intervene in an action by the Attorney General or the EEOC (*ibid.*) confirms the legislative intent to have all claims resolved in a single action. While the purpose of that amendment may have been to make certain the individual employee is protected

by permitting his appearance even where his interest is adequately protected by the Government, the addition in no way suggests an intention to permit a multiplicity of successive suits by employees.

Third, to promote uniformity in development of law, goals, policies and procedures, the amendments make the EEOC the exclusive enforcement agency in Title VII cases (§ 707(c)(e); A-8). They also create an Equal Employment Opportunity Coordinating Council charged with promoting uniformity in policies and practices among enforcement agencies (§ 715; A-9). That explicit desire for uniformity is inconsistent with successive litigation by employees of issues previously litigated by the Government.

The court of appeals' decision is thus contrary to the congressional purpose as confirmed by the 1972 amendments. That decision makes the judgments entered in all pattern-or-practice suits, whether brought by the Attorney General or the EEOC, subject to subsequent challenge. Given the concurrent jurisdiction conferred by Section 707(e) it is both possible and likely that the result achieved in a suit brought by the Attorney General might be relitigated in a subsequent suit brought by the EEOC.* Indeed, in this case the EEOC, appearing as *amicus curiae* in both lower courts, supported respondents' challenge to the Government's suit. The uncertainty and confusion inherent in having different federal agencies, with differing interpretations of Title VII, pursuing independent courses in successive actions based on the same facts is a result which is incompatible with the effective enforcement of Title VII and with the manifest congressional purpose.

In addition to the confusion and potential for inconsistent results engendered by the holding below, it serves as a potent inducement to employees to bring successive

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* Between 1968 and 1972 the Attorney General filed 74 cases under Title VII. During 1971, 21 injunctions (including that in *United States* v. *Bethlehem*) were obtained (U.S. ATTORNEY GENERAL, ANNUAL REPORT 53-55 (1971)).

cases. The deleterious impact on judicial resources of this inducement to thousands of employees within a plant to sue must be avoided if the courts are to continue efficiently to process cases under Title VII.

The consequence of the holding below is to make all Title VII litigation—particularly pattern-or-practice suits —more complex, lengthy and contentious than before. Those defendants who would otherwise be disposed to cooperate with the Attorney General or the EEOC in order to bring a pattern-or-practice action to a speedy and inexpensive conclusion* will inevitably be deterred from such a course by the knowledge that the entry of a decree may be the beginning, rather than the end of litigation. Unable to achieve protection against future suits for additional and inconsistent relief, defendants will have no choice but to litigate to exhaustion every colorable issue, creating a rec-

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*The cooperation between Bethlehem and the Government in *United States* v. *Bethlehem* illustrates the manner in which compliance efforts can be facilitated to the benefit of all parties. A joint investigation of the Lackawanna Plant by Bethlehem and the Attorney General in 1967 resulted in a cessation of all discriminatory practices by October 1967 (C-2 at 979). Even before the Attorney General commenced *United States* v. *Bethlehem*, Bethlehem entered into an agreement with the Government resolving all aspects of the case except seniority carryover and rate retention. The company, in effect, consented to all provisions of the decree finally entered except those two very limited areas of relief (C-4). The company also instituted an Affirmative Action Program which went even further than the agreement reached with the Government. As a result of that cooperation black employees who had been previously disadvantaged were immediately provided opportunities for special training leading to craft, supervisory and management positions. Specific goals were established for advancement of qualified black employees. They were given an opportunity to transfer out of the predominantly black departments. All of this was accomplished without the delay normally attendant upon litigation. As a consequence what would otherwise have been a long, complicated and costly trial was reduced to eight days and concerned only very narrow issues of remedy. Formulation and implementation of the Amended Decree mandated by the Second Circuit's opinion required yet further cooperation between Bethlehem and the Government which continues to this day.

ord that will offer as little encouragement as possible to future claimants. The increased burden on the courts and the parties is entirely unnecessary.

Nor can any legitimate purpose be served by the needless uncertainty introduced into the operation of collective bargaining agreements, seniority systems and the entire "system of industrial self-government" affecting the rights and expectations of millions of employees (*Cf. United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

For the same reasons, the holding will diminish the ability of the EEOC to resolve charges of discrimination affecting groups or classes of employees by the prescribed methods of "conference, conciliation and persuasion". As long as there is a single employee who is not a party to such conciliation proceedings and who may therefore institute a suit despite conciliation efforts by the Commission (B-1 at 324), a conciliation agreement will not finally dispose of the charge and the conciliation process, if resorted to, will be largely futile.

Finally, the holding increases existing confusion as to the weight to be given to decisions of state civil rights enforcement agencies, private arbitration tribunals and federal agencies. Since a single employer's employment practices are normally subject to the overlapping jurisdiction of such agencies, much judicial time and effort may be saved by giving substantial weight in Title VII litigation to their previous findings and orders. By declining to defer to even a final decree entered pursuant to the order of a federal court of appeals after protracted litigation, the holding below necessarily suggests that the decisions of state and federal agencies and state courts may not be relied upon as having any significant finality.

The fact that the judgment below is interlocutory should not deter a grant of a writ of certiorari in this case. This

petition presents a serious question of law of fundamental importance to the future administration of Title VII which will arise with increasing frequency even before the entry of final judgment herein. If this Court declines review, the district courts, appellate courts, defendants and a variety of federal and state agencies will continue to be burdened by multiple litigation. To decline review simply because of the interlocutory posture of the case is only to defer consideration of the question and create administrative and judicial burdens in the interim.

2. The holding below that respondents do not have "interests such as to be in privity with the Attorney General" (B-1 at 323) is in conflict with the applicable decisions of this Court holding that where an authorized representative asserts an individual's legal right in litigation, the individual is bound by the result and barred from relitigation of the same right. Moreover, that holding is irreconcilable in principle with this Court's decisions* holding that individuals represented in litigation by a government agency are bound by the result. By failing to follow those precedents, the court below not only permits multiple litigation under Title VII, but makes it inevitable.

It is axiomatic that a final decision of an issue has conclusive effect in a subsequent action between the same parties or their privies (*e.g., Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955)). In concluding, without explanation, that respondents are not in privity with the Attorney General, the court below adopted a standard which in its practical effect makes judgments under Title VII binding only upon those who personally were parties to the prior action. That result is contrary to the decision of this Court in *Chicago, R.I. & Pac. Ry.* v. *Schendel*, 270 U.S. 611 (1926). Whether or not respon-

* *E.g.*, Heckman v. United States; Kersh Lake Drainage District v. Johnson, *infra*.

dents' present demand for injunctive relief is precluded by the judgment obtained by the Government on their behalf "must be determined as a matter of substance and not of mere form. The essential consideration is that it [was] the *right* of the [respondents], and of no one else, which was presented and adjudicated" (*id.* at 618, emphasis added). "[A] person whose interest was represented by one having authority to represent him is bound by the judgment" (1B J. MOORE, FEDERAL PRACTICE 1253 (1965)). In particular, "a prior judgment should be binding in other litigation with the same adversary, when the interest of the same beneficiary is represented in both suits, even though the representative or form of representation in the two suits be different" (*id.* at 1435).

The Attorney General is authorized under Title VII to obtain an injunction "to insure the full enjoyment of the rights herein described" (§ 707(a); A-4). The only substantive rights described in Title VII are those of individuals to be free from discrimination in employment (§703(a); A-1). The court of appeals did not question the district court's finding that respondents allege "the same violations by defendants as were alleged by the Attorney General" (B-2 at 2). Nor did that court identify any right or interest asserted by the Attorney General other than the rights of the affected class of employees. Indeed, it held that the relief sought by respondents is only "an extension of the relief sought and obtained in the earlier case" (B-1 at 324). But a mere variation in the form of relief sought cannot change the fact that the underlying rights asserted in both actions were the same.

Trbovich v. *United Mine Workers of America*, 404 U.S. 528 (1972), the only authority cited by the court below to support its conclusion that the Attorney General did not represent respondents, is inapposite because it dealt with union members' right to limited intervention under a different statutory scheme where this Court explicitly found that

such intervention "will not subject the [defendant] to burdensome multiple litigation" (*id.* at 536). By contrast, the decision of the court of appeals in this case necessarily subjects defendant to a continuation of a burdensome subsequent litigation and opens the door for future suits.

Both the original and amended statutes (§ 706(e); A-2; § 706(f)(1); A-5) permit suits by an individual only after the Attorney General or the EEOC has failed to act on his behalf. Nothing therein authorizes an individual suit where an action has been brought on his behalf, but the result is not to his liking. Interpreting similar statutes providing parallel rights of action, this Court has concluded that individuals whose rights were asserted by a government agency were barred from relitigating the same claims.

In *Heckman* v. *United States*, 224 U.S. 413 (1912), the Attorney General, representing the interests of certain Cherokee Indians, sued to set aside purchases of land allotted to the Indians by statute. The Court forcefully rejected the purchasers', contention that the Indian-grantees were necessary parties, holding that the grantees would be barred from relitigating title to the lands by res judicata:

> "... if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison* v. *Stewart*, 93 U.S. 155, 160; *Shaw* v. *Railroad Co.*, 100 U.S. 605, 611; *Beals* v. *Ill. & c.R.R. Co.*, 133 U.S. 290, 295." (224 U.S. at 445-446).

Similarly, in *Kersh Lake Drainage District* v. *Johnson*, 309 U.S. 485 (1940), this Court barred relitigation of the tax liability of certain individual landowners within the drainage district previously litigated by the commissioners of the drainage district. Because the commission-

ers were charged with the duty of "protecting and enforcing creditors' rights on obligations issued by the District" (*id.* at 490), the prior judgments were res judicata as to individual creditors, even though they had not been parties to the commissioners' prior actions.

The court's failure to follow this long-established legal principle has the effect of permitting respondents, whose interests were fully represented in the prior action, to use the very record previously developed as a basis for relief beyond that sought in the prior case. This result is directly contrary to the principles of res judicata and collateral estoppel and should not be permitted to stand.

3. The court of appeals' failure, on the identical record, to adhere to its own findings and holding in *United States* v. *Bethlehem* so far departs from the accepted and usual course of judicial proceedings as to merit review by this Court. By its holding the circuit court has sanctioned respondents' effort to obtain relief which is directly inconsistent with its prior decision.

The court below concluded that the United States did not seek recall from layoff to new departments on the basis of plant seniority and therefore that such relief was not in contention (B-1 at 322). The briefs and opinion in *United States* v. *Bethlehem* make clear, however, that the United States originally demanded transfer and recall rights which would have included those now claimed by respondents. It later conceded, and the court of appeals found, that safety and efficiency of operations at the Plant would be impaired if the transfer rights granted extended to temporary vacancies and transferees were permitted to use their plant seniority upon recall from layoff (C-1 at 663-666). Respondents' requested relief cannot be implemented without expressly rejecting or overruling that finding.

The principal remedy sought by the Government in *United States* v. *Bethlehem* was a system of preferential

transfers by black employees who had been discriminated against from 11 formerly predominantly black departments to entry level vacancies in other departments. In order to encourage, or at least to minimize any deterrent to, such transfers it also sought rate retention ("red circling") and that "black workers who [transfer] . . . be permitted to exercise their plant seniority *for all purposes* following transfer" (Brief for the United States at 39, emphasis added).

Bethlehem's brief on appeal in *United States* v. *Bethlehem* pointed out that permitting the use of plant seniority for "all purposes" created an anomaly in the proposed relief. While black employees, for reasons of safety and efficiency, were not to be permitted to transfer directly to upper-level jobs and thereby to displace ("bump") white employees, that would be the precise result of allowing a transferee to use his plant seniority for purposes of recall from a subsequent layoff or permitting him to transfer to a temporary "vacancy" caused by a layoff and thereafter use plant seniority to advance. Since laid-off workers who are recalled move upward on a seniority basis as the recall progresses, the transferee would rapidly advance to a position in the middle or top of his new line of progression without having acquired the training and experience necessary to perform in a safe and efficient manner.

The United States recognized that since the deleterious effect on safety and efficiency of such indirect "bumping" gave substantial support to the defense of business necessity, that anomaly had serious implications for the success of its appeal. Therefore, in its reply brief it modified its original proposal as follows:

> "... The United States asks only that black transferees and whites compete on the basis of plant seniority for vacancies occurring in the normal course of business—*i.e.*, vacancies caused by an incumbent dying, retiring, or transferring. For this reason, it would be acceptable to the Government if

> the decree were to provide that, as workers are recalled following a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff." (Reply Brief for the United States at 19).

In deciding the case, the court of appeals recognized that the business necessity defense was substantial:

> "Appellees' last group of objections are more substantial. . . . In sum, appellees claim that the Government's requested relief will destroy the efficiency and safety of the Lackawanna plant and that modification of present practices and of the district court order is therefore prohibited by what has become known as the 'business necessity' exception to the requirements of Title VII." (C-1 at 662).
>
> • • •
>
> "We do not say that appellees' concerns over the effects of rate retention and seniority carryover are manufactured or advanced in bad faith. But most of them can be met by the carefully limited order suggested by the Government." (C-1 at 663).

The court concluded that the transfer proposal, as limited by the Government in its reply brief, would not produce "unsettling" effects during periods of layoff and recall which would seriously damage the safety and efficiency of the Plant:

> ". . . Regarding displacements caused by layoffs, the Government suggests that, as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and the unsettling effects of seniority carryover during periods of layoff and recall." (C-1 at 664).
>
> • • •
>
> ". . . the Lackawanna plant will not be thrown into a chaotic game of musical chairs." (C-1 at 666).

Thus, the position taken by the Government in its reply brief in *United States* v. *Bethlehem* was not, contrary to the opinion below, an omission to seek relief "for reasons such as its lack of knowledge, legal strategy, or lack of enforcement staff" (B-1 at 324), but was the result of serious concern over the defense of business necessity which had prevailed in the lower court. The court's adoption of that position was not a mere reference to the problem, but was rather an integral part of the balance it sought to create between the rights of black employees who had been disadvantaged by past employment practices and the interest of all parties in preserving the safety and efficiency of operations at the Plant.

The conclusion of the court of appeals that those issues were not technically decided and that its prior opinion is not binding on subsequent litigants ignores the fact that the effect of the remedy fashioned in *United States* v. *Bethlehem* on the safety and efficiency of the Plant was central to that case. Respondents now seek to have the courts below ignore that finding and relitigate the question, without regard to the considerable burden placed on the courts and defendants by such a result.

Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

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January 18, 1973

Civil Rights Act of 1964, Title VII

Section 703(a). Pub. L. No. 88-352 § 703(a), 78 Stat. 255 [42 U.S.C. § 2000e-2(a)].

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706(a),(e),(f),(g). Pub. L. No. 88-352 § 706(a),(e),(f),(g), 78 Stat. 259 [42 U.S.C. § 2000e-5(a),(e),(f),(g)].

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investi-

gation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * *

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings

for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court . . . shall have jurisdiction of actions brought under this subchapter. . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

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SECTION 707(a). Pub. L. No. 88-352 § 707(a), 78 Stat. 261 [42 U.S.C. § 2000e-6(a)].

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is in-

tended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order aainst the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Civil Rights Act of 1964, Title VII
(As amended by Equal Employment Opportunity Act of 1972)

Section 706(a), (b), (f)(1), (g). Equal Employment Opportunity Act of 1972 § 4, 86 Stat. 104, *amending* 78 Stat. 259 (1964) [42 U.S.C. § 2000e-5(a), (e), (g)].

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent")

within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent

a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an

attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individaul as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimina-

tion on account of race, color, religion, sex, or national origin or in violation of section 704(a).

SECTION 707(c),(d),(e). Equal Employment Opportunity Act of 1972 § 5, 86 Stat. 107, *amending* 78 Stat. 261 (1964) [42 U.S.C. § 2000e-6].

(a) [Unchanged].

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(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted

in accordance with the procedures set forth in section 706 of this Act.

SECTION 715. Equal Employment Opportunity Act of 1972 § 10, 86 Stat. 111.

There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 58—September Term, 1972.

(Argued September 29, 1972 Decided November 3, 1972.)

Docket No. 72-1420

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK, and VELVET BROWN, JR.,

Plaintiffs-Appellants,

v.

BETHLEHEM STEEL CORPORATION; LOCAL 2601, UNITED STEELWORKERS OF AMERICA; LOCAL 2602, UNITED STEELWORKERS OF AMERICA; LOCAL 2603, UNITED STEELWORKERS OF AMERICA; LOCAL 2604, UNITED STEELWORKERS OF AMERICA; LOCAL 3144, UNITED STEELWORKERS OF AMERICA; and UNITED STEEL WORKERS,

Defendants-Appellees.

Before:

MANSFIELD, OAKES and TIMBERS,

Circuit Judges.

Appeal from an order denying a preliminary injunction under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) *as amended,* 1972 U.S. Code Cong. & Ad. News 814 *et seq.,* and the Civil Rights Act of 1866, 42 U.S.C.

§ 1981, in the District Court for the Western District of New York, John O. Henderson, *Judge*.

Reversed and remanded.

RUSSELL SPECTER, Washington, D. C. (Paul J. Spiegelman, Washington, D. C.; Richard Lipsitz and Carmin R. Putrino, Buffalo, New York, of counsel), *for Appellants*.

MARTIN SLATE, Washington, D. C., *for Equal Employment Opportunity Commission, Amicus Curiae*.

RALPH L. MCAFEE, New York, New York, *for Defendant-Appellee Bethlehem Steel Corporation*.

MICHAEL H. GOTTESMAN, Washington, D. C. (Thomas Krug, Buffalo, New York, of counsel), *for Union Defendants-Appellees*.

OAKES, *Circuit Judge:*

Appellants are six black employees at appellee Bethlehem Steel Corporation's (hereinafter "Bethlehem") Lackawanna, New York, plant. All six have at least 15 years' seniority. They filed a motion below seeking a preliminary injunction against Bethlehem and the named appellee locals of the United Steelworkers (hereinafter collectively "the Union") enjoining the recall of laidoff employees on what they claim is a racially discriminatory basis. The complaint proper alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. as amended*, 1972 U.S. Code Cong. & Ad. News 814 *et seq.*, and of the Civil Rights Act of 1866, 42 U.S.C. § 1981, in regard not only to layoff recalls but also to hiring, referral, transfer,

assignment procedures, and advancement opportunities. The district court denied the appellants' motion for a preliminary injunction on the ground that in a previous case brought by the Attorney General against the defendants in this circuit, *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977 (W.D.N.Y. 1970), *modified*, 446 F.2d 652 (2d Cir. 1971), the relief sought here was considered but not granted. We reverse and remand to the district court for findings and an order in accordance with this opinion.

The district court proceeded upon the erroneous assumption that it was bound as against these appellants by the modified order in the earlier Title VII case. That case involved seniority and transfer provisions of the collective bargaining agreements between Bethlehem and the Union which both the trial and appellate courts found discriminatory, one form of discrimination consisting of assignment in the past of black employees to 11 of the less desirable departments of the Lackawanna plant. The seniority system, based upon departmental rather than plantwide service, was found to have helped perpetuate the discrimination by "locking in" black employees to the less desirable departments and jobs. The question of recall from layoff was touched upon only to clarify that it was an issue which was not decided in that case. The Attorney General had originally urged that plant seniority be used "for all purposes," although the specific relief sought related only to retention of earlier pay rates and seniority carry-over for employees transferring from one department to another and then only in the situation of a vacancy occurring in the other department. In Bethlehem's and the Union's answering briefs on appeal they had urged that use of a plantwide seniority system would result in permitting laidoff black employees to move into jobs they had never held before the layoff ahead of both black and

white employees who had held such jobs. Meeting this argument, the Government in its reply brief on appeal contended that the relief it sought related only to vacancies caused by death, retirement or transfer and that it would be acceptable if on recall after layoff "all employees shall assume the same positions relative to each other as they held immediately prior to the layoff." Reply Brief for the Appellant at 19, *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). In other words, the Government expressly did not seek the very relief plaintiff-appellants seek here.

In the court's opinion Judge Feinberg noted that most of Bethlehem's and the Union's concerns over the effect of seniority carry-over could be "met by the carefully limited order suggested by the Government," 446 F.2d at 663, and, after noting the Government's suggested exception for recall after layoff, pointed out that the suggested exception would limit "the unsettling effects of seniority carryover during periods of layoff and recall." *Id.* at 664. The court's order adopted the Government's suggestion. *Id.* at 666. It is thus true as Judge Henderson said below that this court "considered" the question of recall after layoff, but only to point out that in accordance with the Government's "moderate" prayer for relief, *id.* at 659, the question was not in contention. Indeed, the United States, now acting through the Equal Employment Opportunity Commission ("EEOC") as amicus curiae, takes the position that this court should grant the relief the United States previously *did not seek*.[1] The EEOC goes on to point out

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1 The Assistant Attorney General for Civil Rights on July 16, 1971, wrote the Union's counsel that the Government's agreement to interpretation of the district court order in accordance with the suggestion it had made on appeal "does not foreclose our right to seek such relief in other cases of this kind." Letter from David L. Norman to Michael H. Gottesman, in Appellants' Appendix at 27a.

that between 1968 and 1972 Bethlehem laid off about 50 per cent of its workers, so that arguably a change of circumstance has occurred since suit was first instituted by the Government and new relief is justified. We need not, however, rest our decision on that narrow ground.

For purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, *NLRB* v. *Lannom Manufacturing Co.*, 226 F.2d 194, 199 (6th Cir. 1955), *rev'd on other grounds sub nom. Amalgamated Meat Cutters v. NLRB*, 352 U.S. 153 (1956), nor have interests such as to be in privity with the Attorney General. *Cf. Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-39 (1972) (intervention by union members permitted in Labor-Management Reporting and Disclosure Act litigation brought by the Secretary of Labor). Therefore, the judgment in the previous case does not have conclusive force here. *See* Restatement of Judgments § 93 *et seq.* (1942); 1B J. Moore, Federal Practice ¶ 0.411[1] (2d ed. 1965). *See also Hartford Accident & Indemnity Co.* v. *Jasper*, 144 F.2d 266, 267 (9th Cir. 1944).

Nor, for the reasons explained above—namely that the Government did not seek relief in the case of recall after layoff—does the earlier decision bind us on the basis of stare decisis. *O'Donoghue* v. *United States*, 289 U.S. 516, 550 (1933); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821); 1B J. Moore, *supra* at ¶ 0.402[2].

Under Title VII since its inception, moreover, the individual has played a significant role in its enforcement. *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968). This is equally true after the amendment of Title VII by the Equal Employment Opportunity Act of 1972, 1972 U.S. Code Cong. & Ad. News 814 *et seq.* While the 1972 amendments authorize the Equal Employment Oppor-

tunity Commission to bring a Title VII suit in the name of the Government, individuals party to Commission conciliation proceedings in the same action may intervene in such suits, and in those brought by the Attorney General, *id.* § 706(f)(1), 1972 U.S. Code Cong. & Ad. News 817-18,[2] and presumably individuals not party to the Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General.

The purpose of permitting the individual who has been discriminated against to seek relief where the Government has omitted to do so—possibly for reasons such as its lack of knowledge, legal strategy, or lack of enforcement staff—is plainly to make certain that the individual employee is protected. Indeed, in the case of the Bethlehem Lackawanna plant, when the Attorney General instituted the earlier case in 1967 only 3.8 per cent of the nation's workforce was unemployed. U.S. Bureau of Labor Statistics, Dep't of Labor, 19 Employment & Earnings 20 (Sept. 1972). The very first case involving the issue of discriminatory seniority and transfer systems was decided only in January of 1968. *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The discriminatory impact of a departmental seniority recall system where there have been a multitude of layoffs may not have been foreseen by Government counsel in the earlier suit, especially where the Government was concerned with establishing a favorable precedent in the case of interdepartmental transfers. Thus, this case is one which properly seeks an extension of the relief sought and obtained in the earlier case. The

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2 Not insignificantly, in debating the Equal Employment Opportunity Act, Congress refused to make Title VII the exclusive statutory basis for private suits against employment discrimination and continued to allow suits to be brought, for example, under Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. *See* 118 Cong. Rec. S1524-26 (daily ed. Feb. 9, 1972); *id.* at S1791-97 (daily ed. Feb. 15, 1972).

individual plaintiffs, we hold, are entitled to bring it. This being true, we are required to reverse the decision below so that the trial court may proceed to the merits of the case.

We do not ourselves, however, grant the preliminary relief sought. True, the scope of relief to be afforded is "so far as possible, to eliminate the present effects of past discrimination," *Long* v. *Georgia Kraft Co.*, 450 F.2d 557, 561 (5th Cir. 1971). *Accord, Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720-21 (7th Cir. 1969). True also, the court's powers under Title VII are "broad," *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238 (5th Cir. 1971), and, of course, include the power to grant preliminary relief. *United States* v. *Hayes International Corp.*, 415 F.2d 1038, 1044-45 (5th Cir. 1969). Moreover, the findings of past discrimination by the district court in *United States* v. *Bethlehem Steel Corp., supra,* 312 F. Supp. at 979-86, and the Bethlehem stipulation in the earlier case that until October 1, 1967, black employees were assigned on account of race to 11 of the 82 departments at the Lackawanna plant, in which the hottest, dirtiest and lowest-paying jobs were located, are together fairly conclusive of past discrimination here which cannot be frozen into the plant employment system under the Act. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971).

But we do not delineate the precise extent of the preliminary (or final)[3] relief which might be granted for the reason that there appear to us to be several areas warranting, if not requiring, exploration by the district court. These include the question how extended a layoff must be

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3 This may be an appropriate case for the district court under Fed. R. Civ. P. 65(a)(2), to exercise its power to hear the applications for preliminary and permanent relief simultaneously.

before it is no longer temporary.[4] We should add, however, that we do not take the position, urged upon us by appellees, that in the case of an extended layoff there is truly a "bump" of white workers as that term was used in our own opinion in *United States* v. *Bethlehem Steel Corp., supra,* 446 F.2d at 663-64, or has been described in the seminal Note, *Title VII, Seniority Discrimination and the Incumbent Negro,* 80 Harv. L. Rev. 1260, 1273-74 (1967) (advocating "rightful place" as opposed to "freedom now"), and the first seniority rights cases following it, *Quarles* v. *Philip Morris, Inc., supra,* 279 F. Supp. at 516; *Local 189, United Papermakers* v. *United States,* 416 F.2d 980, 988-91 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). Rather, we agree with the Fifth Circuit that recall privileges after an extended layoff which operate to the residual disadvantage of black workers who had been discriminated against by a seniority system can violate Title VII and are subject to judicial modification. *United States* v. *Hayes International Corp.,* 456 F.2d 112, 118-19 (5th Cir. 1972). *See also Local 1251, UAW* v. *Robertshaw Controls Co.,* 405 F.2d 29, 33 (2d Cir. 1968) (en banc) ("Seniority is wholly a creation of the collective agreement and does not exist apart from that agreement"), and *Developments in the Law —Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1155-63 (1971).[5]

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4 Under Art. X, 10.10.05 of the 1968 Master Agreement, we are told, an employee laid off for six months or more has the right (if he has two years' plant service) to a job in any seniority pool in the plant if he is qualified to perform the job and for the promotional sequence. The court may well wish to determine whether that six months is an unreasonable time.

5 While we do not, by omission, summarily reject appellees' arguments dealing with plant safety and efficiency, the "team concept" and other factors (including individual ability) which the courts have taken into account in Title VII cases, *provided that the practice involved is essential to those goals, e.g., United States* v. *Bethlehem Steel Corp., supra,*

Some other questions which will occur to the district court in fashioning full, fair, just and adequate relief may include:

1. To what class should any relief extend? *E.g.*, should only black employees hired before the October 1, 1967, date that marked the apparent end of discriminatory hiring be assisted? Subsidiarily, of what class are the plaintiffs here representative? The Union suggests that many black employees would oppose the relief sought here.

2. How does the seniority system affect pools?[6] Should relief be limited to recall to "pools" as distinguished from recall to positions up the ladder? Parenthetically we note that this question may be academic since we gather that employees "bump up from" and "down to" the "pool" so that generally employees are recalled only to pools, but we lack the findings to be certain of this.

3. Should laidoff white employees also be treated as having plantwide seniority? If they were, would this have the

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446 F.2d at 662, we do point out that the Master Agreement itself recognizes plant seniority as the basis for recall under certain conditions, which tends to weaken somewhat the force of appellees' arguments justifying unit seniority. *See* n.4 *supra*.

6 Under the amended decree in *United States* v. *Bethlehem Steel Corp.*, Civil No. 1967-32 (W.D.N.Y., filed Oct. 14, 1971), recall has worked as follows:

A. Laidoff employees have been recalled to or assigned into pool jobs, usually entry-level jobs, on the basis of plant service;

B. Employees have been recalled from pool jobs to higher rated jobs in their seniority unit on the basis of unit, not plant service, except as to

C. Black employees who had transferred out of the 11 "black" departments, as to whom plant service of all competing employees is used to determine the order of recall.

Apparently also Bethlehem has decreased the number of job pools from 36 to 6, thus permitting easier transfer since transfers between departments in the same pool were apparently permissible. *See* Brief for Appellee Bethlehem Steel Corp. at 8.

effect of recalling white employees to positions held before layoff by black employees, and, if so, would this be consistent with Title VII?

Thus, in remanding to the district court, we do so for the purpose of enabling it further to explore the facts and adjust the relief accordingly, recognizing that we are not dealing in absolutes that require an appellate court to be the bull in a china shop of complex inter-employee and plant relations. At the same time we know that the district court is aware of our own injunction, so well expressed in Judge Feinberg's opinion, that "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." 446 F.2d at 663.

The district court on remand, we are confident, will act, in the phrase of Charles V, with an "iron hand in a velvet glove."

Reversed and remanded.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE H. WILLIAMSON, JR; TIMOTHY SMITH; JAMES B. LINDSAY; EDWARD GREEN, JR; WILLIAM A. CLARK; and VELVET BROWN, JR,

Plaintiffs

-vs-

CIVIL 1971-487

BETHLEHEM STEEL CORPORATION, a corporation; LOCAL 2601, UNITED STEELWORKERS OF AMERICA; LOCAL 2602, UNITED STEELWORKERS OF AMERICA; LOCAL 2603, UNITED STEELWORKERS OF AMERICA; LOCAL 2604, UNITED STEELWORKERS OF AMERICA; LOCAL 3144, UNITED STEELWORKERS OF AMERICA; and UNITED STEELWORKERS,

Defendants

APPEARANCES: SPECTER & SPIEGELMAN (PAUL J. SPIEGELMAN, ESQ., of Counsel), Washington, D.C.; LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES (RICHARD LIPSITZ, ESQ. and CARMIN R. PUTRINO, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

CRAVATH, SWAINE & MOORE (RALPH L. MCAFEE, ESQ., of Counsel), New York, New York; HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (STEPHEN KELLOGG, ESQ., of Counsel), Buffalo, New York, for Defendant Bethlehem Steel Corp.

B-

BREDHOFF, GOTTESMAN & COHEN (MICHAEL GOTTESMAN, ESQ., of Counsel), Washington, D.C., for Defendant United Steelworkers.

A.C. WHARTON, JR., ESQ., Washington, D.C., for the Equal Employment Opportunity Commission.

Plaintiffs, six black employees of Bethlehem Steel's Lackawanna plant, commenced the present action under Title VII of the Civil Rights Act of 1964 on behalf of themselves and other such employees who they claim are similarly situated. The complaint alleges the same violations by defendants as were alleged by the Attorney General before this court in United States v. Bethlehem Steel Corporation, et al., 312 F. Supp. 977, modified, 446 F.2d 652 (2d Cir. 1971). The difference here is that plaintiffs are seeking additional remedies not granted in the suit by the Attorney General. These additional remedies include a claim to back pay and certain claimed rights regarding recall from layoff.

Plaintiffs now seek a preliminary injunction enjoining defendant Bethlehem Steel Corporation from limiting black employees in a layoff status to return

to employment only to openings in the department or seniority unit in which they were employed at the time of their layoff. They seek instead to have black employees afforded the opportunity to return to any department or seniority unit in which an opening occurs, which can be filled by an employee in a layoff status based upon qualifications and plant seniority.

The Equal Employment Opportunity Commission, which has previously been granted amicus curiae standing in this matter, supports plaintiffs' position. Defendants oppose the application on a number of grounds, including a claim that the Second Circuit opinion and subsequent order in United States v. Bethlehem Steel Corporation, et al., supra, preclude the granting of such relief. Plaintiffs contend that the question of recall from layoff was neither urged nor decided by the Second Circuit. For the reasons set forth below, plaintiffs' motion for a preliminary injunction is denied.

In United States v. Bethlehem Steel Corporation, et al., supra, the government urged, both before the court initially and on appeal, that plant seniority be used by members of the affected class "for all purposes." Both the company and the union argued that such a broad plan would work gross inequities among black as well as white employees. Specifically, in the layoff recall situation they pointed out in their answering briefs on appeal that such a broad plan would have the effect of permitting members of the affected class to move into jobs, which they never held before the layoff, ahead of both black and white employees who had held such jobs prior to the layoff.

Apparently in response to this position, the government, at page 19 of its reply brief to the Court of Appeals, stated:

> "The United States asks only that black transferees and whites compete on the basis of plant seniority for vacancies occurring in the normal course of business -- i.e., vacancies caused by an incumbent dying, retiring, or transferring. For this reason, it would be

> acceptable to the Government if the decree were to provide that, as workers are recalled following a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff."

The Second Circuit, in its opinion, seemed to clearly acknowledge this limitation in the government's proposal. It stated specifically that

> "[T]he right of transfer or to bid upward, under the Government's proposals, would not be unlimited or unconditional. A transfer would only be to fill vacancies; there would be no bumping of 'white' employees out of a job. . . . Thus it is clear that the relief sought by the Government is moderate." 446 F.2d at 659.

In the same respect, the court went on to observe the following:

> "We do not say that Appellees' concerns over the effects of . . . seniority carryover are manufactured . . . But most of them can be met by the carefully limited order suggested by the Government. . . . [B]ecause plant seniority will only be used in bids upwards for vacancies occurring in the normal course of business, i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job, an employee will not

> be 'bumped' out of his job in such situations by a transferee. Regarding displacements caused by layoffs, the Government suggests that, as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and the unsettling effects of seniority carryover during periods of layoff and recall." (Id. at 663-664. Emphasis added.)

Finally, at the end of its opinion the Court of Appeals set forth the following:

> "On appropriate order we should grant an employee who has been discriminated against ('a transferee') at least the following relief:
>
> . . . .
>
> "(2) A transferee shall be permitted to exercise plant seniority for all purposes following transfer, except as otherwise set forth herein. . . . As workers are recalled after a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to layoff. (Id. at 666; emphasis added)."

In view of the foregoing, this court finds that the relief sought by plaintiffs in the present

motion for a preliminary injunction was considered by the Court of Appeals and concludes that such relief is precluded by its opinion, order and subsequent amended decree entered by this court. Accordingly, the motion is denied.

It is so ordered.

/s/ John O. Henderson

JOHN O. HENDERSON
United States District Judge

DATED: Feb. 16th 1972.

UNITED STATES of America,
Plaintiff-Appellant,

v.

BETHLEHEM STEEL CORPORATION et al., Defendants-Appellees.

No. 266, Docket 35183.

United States Court of Appeals, Second Circuit.

Argued Dec. 7, 1970.

Decided June 21, 1971.

Suit was filed pursuant to Title VII Civil Rights Act of 1964 in which it alleged that employer discriminated inst blacks in hiring, job assignment, renticeship and selection of supervi- personnel at its plant, and an ndment to complaint added unions as ndants. The United States District rt for the Western District of New k, John O. Henderson, Chief Judge, ed portion of relief sought by Unit- States, and United States appealed. Court of Appeals, Feinberg, Circuit e, held that where seniority and fer provisions were found to tend perpetuate effects of employer's r admitted discriminatory prac- and concerns over effects of rate tion and seniority carry-over to t the discriminatory effects could a carefully limited order and if discriminatorily assigned employees could not keep in their new jobs their former rate of pay and seniority few would transfer and those that did would suffer an economic penalty and be forever behind their white contemporaries, relief requested with regard to seniority carry-over and rate retention should have been granted.

Order modified and case remanded.

1. Civil Rights ⇐3

Where effect of employer's admitted, numerous discriminatory practices over many years was to force blacks into 11 less desirable departments in plant solely on basis of race and though such overt practices were finally discontinued seniority and transfer provisions perpetuated their effects by tending to lock discriminatorily assigned employees into their jobs and by providing that transferee to a "white" department would never be able to reach level of white employee already there, seniority and transfer provisions were based on past discriminatory classifications and their continued use perpetuated discrimination and violated Civil Rights Act of 1964. Civil Rights Act of 1964, § 703(a, h), 42 U.S.C.A. § 2000e-2(a, h).

2. Civil Rights ⇐13

In action under Title VII of Civil Rights Act of 1964 with complaint alleging that employer discriminated against blacks in hiring, job assignment, apprenticeship and selection of supervisory personnel at plant, where discrimination found illegal was to a group, group remedy was appropriate. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐3

Even a discriminatory system that does not completely deter job transfers but only discourages them should be changed and criterion in fashioning a remedy under Title VII of Civil Rights Act of 1964 is what would be necessary to insure sufficient incentive to transfer

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that effects of past discrimination would not be perpetuated, and relief under the Act should give discriminated employees as future vacancies arise the opportunity to obtain jobs that they would have earned had there been no discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Courts ⇐406.9(5)

Even under abuse of discretion test of review, if court used erroneous criterion in applying Title VII of Civil Rights Act of 1964 to correct admitted former discriminatory practices in hiring and in job, apprenticeship and supervisory assignments, order should be modified. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐8

Provision of Title VII of Civil Rights Act of 1964 that it shall not be an unlawful employment practice for employer to apply different terms or conditions of employment pursuant to bona fide seniority system providing that such differences are not result of intention to discriminate because of race would not protect seniority system which tended to perpetuate effects of employer's prior admitted discriminatory practices in hiring and in job, apprenticeship and supervisory assignments, and alteration of seniority rights to correct effects of the past discrimination would not be improper. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e–2(h).

6. Civil Rights ⇐8

In suit in which seniority and transfer provisions were found to tend to perpetuate effects of employer's prior discriminatory practices, "business necessity" exception to requirements of Title VII of Civil Rights Acts of 1964 had to mean more than that transfer and seniority policies served legitimate management functions, and to be preserved policies had to not only directly foster safety and efficiency of plant but be essential to those goals and if legitimate [illegible] safety and efficiency could be served by reasonably available alternative system with less discriminatory effects, present policies could not be continued. Civil Rights Act of 1964, § 7 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⇐8

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's prior discriminatory practices and basic goal of seniority system would not necessarily be frustrated by remedies of rate retention and seniority carry-over, unqualified workers did not need to be promoted whether or not he was a transferee under the order and transferees were not moved directly to high or middle level jobs and did not displace workers from jobs presently held, business necessity doctrine did not require denial of proposed relief of use of rate retention and seniority carry-over. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐8

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's former admitted discriminatory practices and concern over effects of rate retention and seniority carry-over to correct the discriminatory effects could be met by a carefully limited order and if discriminatorily assigned employees could not keep in their new jobs their former rate of pay and seniority few would transfer and those that did would suffer an economic penalty and be forever behind their white contemporaries, relief requested with regard to seniority carry-over and rate retention should have been granted. Civil Rights Act of 1964, §§ 701 et seq., 703(a, h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a, h).

9. Civil Rights ⇐8

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's prior admitted discriminatory practices and to correct those discriminatory effects relief with regard to seniority carry-over and rate retention should have been granted, such relief should have been extended to em

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ployees who had been discriminatorily assigned to departments and thereafter had exercised their limited right to transfer, as well as those employees who had not transferred, since the former suffered effects of discrimination and were unable to reach same level as their white contemporaries. Civil Rights Act of 1964, §§ 701 et seq., 703(a, h), 42 U. S.C.A. §§ 2000e et seq., 2000e–2(a, h).

10. Civil Rights ⇐3

Evidence showing at most that at some indeterminate time in past certain ethnic groups congregated in certain departments because man in charge tended to hire such persons was not sufficient proof that any of white employees in those departments were there because they could not obtain jobs elsewhere in the plant and was insufficient to support district court's finding that any of the whites were victims of discrimination prohibited by Title VII of Civil Rights Act of 1964. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Civil Rights ⇐3

Where seniority and transfer provisions were found to tend to perpetuate effects of employer's prior admitted discriminatory practices against blacks and there was no proof that employer rejected any white applicants to apprenticeship program on basis of religion, sex or national origin and there was no reason given for change from pretrial order relief based upon discrimination in apprenticeship program applying to Negro applicants, district court erred in extending relief to white applicants. Civil Rights Act of 1964, § 701 et seq., 42 U. S.C.A. § 2000e et seq.

David L. Rose, Atty., Dept. of Justice (Jerris Leonard, Asst. Atty. Gen., H. Kenneth Schroeder, Jr., U. S. Atty. W. D. N. Y., Robert T. Moore, Atty., Dept. of Justice, on the brief), for plaintiff-appellant.

Ralph L. McAfee, New York C (Cravath, Swaine & Moore, New Yo City, on the brief), for defendant-appe lee Bethlehem Steel Corp.

Michael Gottesman, Washington, D. (Bredhoff, Gottesman & Cohen, Was ington, D. C., Bernard Kleiman, Chica Ill., Thomas Krug, Tiernan, Krug Godinho, Buffalo, N. Y., on the brie for defendants-appellees Unions.

Before LUMBARD and FEINBER Circuit Judges, and CLARIE, Distri Judge.*

FEINBERG, Circuit Judge:

In December 1967, the Attorney Ge eral of the United States brought an tion against the Bethlehem Steel Cor ration in the United States Distri Court for the Western District of N York. Suit was filed pursuant to Ti VII of the Civil Rights Act of 1964, U.S.C. § 2000e et seq., a historic legis tive attempt to deal with the natio problem of discrimination in empl ment. The complaint alleged that Be lehem discriminated against blacks hiring, job assignment, apprentices and selection of supervisory personnel its plant in Lackawanna, New York. amendment to the complaint in M 1968 added the United Steelworkers America and five local unions as defe ants and alleged that portions of t collective bargaining agreement betw Bethlehem and the unions perpetua discrimination.

Before trial, defendants admitted t many of the charges against them w true, but they refused to stipulate t portions of the labor contract viol the Act. A trial on that one issue held before Chief Judge John O. P derson. The judge held in a compre sive opinion, 312 F.Supp. 977, that contract provisions as to transfer ri and seniority did perpetuate the eff of prior discrimination. As a result judge granted priority transfer right those who had been discrimin against, but denied a portion of th

* Of the District of Connecticut, sitting by designation.

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...ught by the Government that would have made the exercise of such rights more attractive. From that order only the Government appeals. For reasons set forth below, we modify the order. The principal effect of our opinion is to grant to those who have been treated illegally in the past the right to transfer without loss of pay or seniority.

I.

The Lackawanna plant, one of the largest of its type in the country, employs about 18,000 workers, of whom approximately 2,600 are black. Operations at the plant cover all phases of steel production from the receipt of raw materials to the final product. Hourly-paid employees, who are represented by the defendant unions, work in 74 of the plant's 82 departments. The 74 departments are organized into 81 seniority units, most of which coincide with the structure of departments.[1] However, in the Coke Ovens Department, of particular interest here, there are four seniority units.

The facts as to discrimination were admitted by defendants in two extensive stipulations. These showed that both before and after the passage of the Civil Rights Act of 1964 blacks were treated unfairly at the Lackawanna plant in hiring, job assignment, apprenticeship and selection of supervisors. The following patterns of discrimination continued up to the time when the Government began its inquiry into Bethlehem's practices. In hiring, jobs were made available to whites rather than to blacks in a number of ways. There were no fixed or reasonably objective standards and procedures for hiring; the aptitude test scores of some white applicants were fraudulently raised; some white applicants were hired without testing; and whites were given preference in summer employment. Job assignment practices were even more reprehensible. Over 80 per cent of black workers were place... 11 departments, which contained ... hotter and dirtier jobs in the pl... Blacks were excluded from higher ... ing and cleaner jobs. All of the def... ants were aware of this racial discri... nation. Even within a department, ... pattern continued. In the Coke Ov... Department the blacks were assigned ... the most part to the two poorest ... and least desirable of the four senio... units. Similar preferential treatm... was given to whites in the choosing ... apprentices and in the selection ... supervisors.

All of this is a very brief summary ... a general pattern of racial mistreatm... that had existed at the Lackawa... plant for many years. There is no n... to continue with a further descript... It is enough to say that a sorry pict... emerges, made no less so by the undou... ed cooperation of Bethlehem with ... Government once the investigation ... commenced. The fact is that the Lac... wanna plant was a microcosm of clas... job discrimination in the north, mak... clear why Congress enacted Title VI... the Civil Rights Act of 1964.[2]

At trial, the major question ... whether the seniority and transfer p... visions of the collective bargain... agreement perpetuated the effects of ... years of discrimination. Up to a dec... ago, seniority at the Lackawanna pl... had been departmental rather th... plant-wide. That is, for purposes ... layoff, recall and promotion senior... had been based on the time spent wit... a department or seniority unit rat... than on the time elapsed from origi... employment. In 1962, this was alte... somewhat for purposes of layoff and ... call. "Pool areas" were established, c... sisting of the lower paid jobs of one ... more departments; an employee abo... to be laid off in his department co... exercise plant-wide seniority and tra... fer into a "pool" job.

1. While "department" and "seniority unit" are not synonymous, we will treat them as identical except where otherwise indicated.

2. See generally M. Sovern, Legal Restraints on Racial Discrimination 3–8, 61–102 (1966); C. Silberman, Crisis in Black and White 234–238 (1964).

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Before 1962, employees had no right to transfer between departments. With the establishment of the pool areas, workers were allowed to use plant seniority to bid on job vacancies in another department sharing the same pool, if the employee was qualified to perform the work and the vacancy had not otherwise been filled. Usually such openings were filled by promoting the most senior worker in the job immediately below the vacancy. Therefore, the only jobs available for intra-pool transfers were generally at the low paid, entry level. In 1965, similarly limited plant-wide transfer rights became available allowing transfers to lower level jobs in any department that had not been filled by an intra-pool transfer.[3] Employees who transferred under either plan lost accrued seniority for purposes of promotion, and were paid at the rate for their new entry level jobs. Even these limited transfers were not permitted among the four seniority units of the Coke Ovens Department until 1968.

Before Chief Judge Henderson, the Government argued that the combined effect of these arrangements was to keep blacks in the jobs to which they had originally been assigned for racial reasons and that the seniority and transfer provisions of the labor agreements were therefore improper. Defendants argued that these practices were typical of the steel industry, were required for reasons of safety and efficiency and had not been instituted or continued for discriminatory reasons. Chief Judge Henderson, to a great extent, agreed with the Government. Thus, the judge found:

> In other words, an employee who chooses to exercise either of these transfer rights must forfeit all of the benefits of seniority which he had accrued in his pre-transfer position, such as pay rate, promotion opportunities, protection against demotion, jo... tion, and enter the new unit as a new man, generally going to the entry level job.
>
> The court finds as fact that the transfer and seniority system negotiated in the 1962, 1965 and 1968 Master Agreements by the company and union, operates (as described above) in such a way as to tend to lock an employee into the department to which he has been assigned. This lock-in effect becomes stronger as an employee's length of service increases in a department. This means that the longer a Negro has worked in the hot and dirty department to which he was admittedly discriminatorily assigned the more he has to lose by transfer.
>
> * * * * * *
>
> The prohibition against tr...sfer [within the Coke Ovens Depa...t] * * * was instituted for the pose of discriminating against ...groes. Local 2601's acquiescence therein established that prohibition a part and parcel of the Coke Ovens s niority system. The Coke Ovens se seniority system and prohibiti against transfer had the purpose a effect of segregating Negroes with the Coke Ovens and denying the equal opportunity of employment the Coke Ovens.

312 F.Supp. at 985–986, 989. Concl ing from these findings that the sen ity and transfer provisions tended perpetuate the effects of Bethlehe discriminatory practices, the dist court held in substance that they w "unlawful employment practices" un Title VII. 42 U.S.C. § 2000e–2.

As for the admitted discrimina practices in hiring and in job, app ticeship and supervisory assignm the district court, for the most p adopted the relief to which the pl

3. These transfer rights are embodied in an industry wide master agreement negotiated between representatives of the International Union and representatives of the steel industry. The local unions and the individual companies apply the master agreement in accordance with the custo and usages of each plant. The seniori and transfer provisions challenged in th case were included in the 1962, 1965 a 1968 Master Agreements.

...nipulated. The court ordered appellees to establish objective criteria for hiring and promotion, to administer the apprenticeship and related programs in a non-discriminatory fashion, and to report to the court and to the Government the steps taken to comply with the decree. As for the seniority and transfer provisions, the court expanded the contractual transfer rights of all employees working in the 11 departments that had been the focus of the discriminatory practices. Employees in these departments, who were hired before October 1, 1967,[4] were given priority transfer rights, under the collective bargaining agreement, into any of the other departments. Moreover, within the Coke Ovens Department, employees discriminatorily assigned to two seniority units were given similar priority transfer rights into the two other units of that department that contained more desirable jobs.[5] To further increase mobility, the judge also ordered defendants to diminish the number of pool-areas in the plant.[6]

However, the judge did not grant all the relief sought by the Government. The court refused to order that (1) future transferees from the 11 departments should be paid in their new jobs at a rate at least equal to their average hourly earnings in their former jobs,[7] and (2) in their new jobs, the transferees should get the benefit of plant rather than unit or department seniority for all purposes. The judge's principal reasons for denying such rate retention and seniority carryover apparently were that the present seniority and trans... system was not a complete deterrent... transfer, and that other employees wo... be treated unfairly and might beco... disgruntled if the system were chan... as the Government requests.

The Government appeals, claim... that the order of the district court is... some respects too broad and in oth... too narrow. The most significant of... objections are in the latter catego... We discuss these and other issues... Parts III and IV of this opinion. ... Part V, we summarize the order that ... believe should be entered.

II.

Before considering the appropriate ... lief for the violations found and e... though there is no appeal either ... Bethlehem or the unions, we think it ... portant to discuss briefly Chief Ju... Henderson's conclusions that the seni... ity and transfer provisions of the col... tive bargaining agreements violated ... tle VII of the 1964 Civil Rights A... We do so because the judge dealt w... basic issues in a Title VII case that m... recur in other proceedings in this ... cuit.

Section 703(a) of Title VII, 42 U.S... § 2000e–2(a), prohibits an emplo... from discriminating against an emplo... "with respect to his compensati... terms, conditions, or privileges of ... ployment, because of such individu... race * * *" or from limiting, seg... gating or classifying an employee ... any way which would deprive or tend... deprive any individual of employm...

4. This is the date when Bethlehem voluntarily ceased its discriminatory practices other than those embodied in the seniority and transfer provisions.

5. The court also prohibited Bethlehem from subjecting potential transferees under the decree to any unusual tests of their qualifications for the jobs to which they wished to transfer.

6. Defendants have apparently begun compliance with the district court's order. Moreover, they have voluntarily increased a transferee's "bump back" rights. A ...nsferee now has an absolute right to return to his former department within 60 days without loss of seniority earned in that department. In addition, a transferee will continue to earn seniority in his former department for two years and, if laid off from his new department, may return to his former department with full seniority.

7. If the new department or unit does not have a job that pays as well as the transferee's former job, the Government requests that he be paid at the rate of the top job in the department.

opportunities or otherwise adversely affect his status as an employee, because of such individual's race."[8] From Judge Butzner's seminal opinion in Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D.Va.1968), to the Supreme Court's recent and first decision on the merits of a Title VII race discrimination case, Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), a basic question has been whether racially neutral practices that perpetuate the effects of past discrimination are "unlawful employment practice[s]" as defined in that section.[9] The issue before Chief Judge Henderson was whether the seniority and transfer system at the Lackawanna plant, although racially neutral on its face, violated the Act.

[1] The effect of Bethlehem's admitted, numerous discriminatory practices over many years was to force blacks into the 11 less desirable departments in the Lackawanna plant solely on the basis of race. Although these overt practices were finally discontinued after October 1, 1967—over two years after the effective date of Title VII and in response to governmental investigation—the seniority and transfer provisions perpetuated their effects in two ways. First, they tended to lock discriminatorily assigned employees into their jobs. In order to transfer to a formerly "white" department these employees were required to suffer an economic penalty, forfeiture of seniority rights and pay levels earned in the "black" department. The former was due to the use of departmental seniority, the latter to the fact that the transferee's new job was at the entry level in the new department. Thus, to obtain an opportunity that had been denied them because of race, these employees had to be willing to give up what was already theirs because of service in the plant. Second, a transferee to a "white" department would never be able to reach the level of a white employee already there. For example, if a black and a white employee had been hired at the same time and the latter had been assigned to the more desirable "white" department, but the black had not been so assigned, the white started to accumulate department or unit seniority in that department but the black did not. Even if the black were given the chance years later to transfer into the "white" department, the earlier discriminatory job assignment had denied him the chance to earn seniority up to that time in the "white" department. Therefore, the use of departmental or unit seniority for purposes of promotion in the formerly "white" department continues the effect of the earlier discriminatory practice. See Local 189, United Papermakers v. United States, 416 F.2d 980, 988–991 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 108 (1970).

It is true that section 703(h) of Title VII, 42 U.S.C. § 2000e–2(h) provides that "it shall not be an unlawful employment practice for an employer to apply different * * * terms [or] conditions * * * of employment pursuant to a bona fide seniority" system "provided that such differences are not the result of an intention to discriminate because of race * * *."[10] Chief Judge

8. 42 U.S.C. § 2000e–2(c) defines as unlawful employment practices similar acts when done by a labor union.

9. See also Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); United States by Clark v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir. 1969); United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 108 (1970).

10. 42 U.S.C. § 2000e–2(h) provides, in part, that:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions,

Henderson held, 312 F.Supp. at 993, that this section does not apply to this case, reasoning that a seniority system based on earlier discriminatory job assignments into various departments is not "bona fide." See *Local 189, supra*, 416 F.2d at 988, 994–995; *Quarles, supra*, 279 F.Supp. at 514–519. The pervasiveness and longevity of the overt discriminatory hiring and job assignment practices, admitted by Bethlehem and the unions, compel the conclusion that the present seniority and transfer provisions were based on past discriminatory classifications. See generally Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598 (1969); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1155–1166 (1971); Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Accordingly, Chief Judge Henderson's conclusions that the continued use of the seniority and transfer provisions perpetuated discrimination and therefore violated the Act were surely correct.

III.

This brings us to the issue raised by this appeal: whether the district court should have ordered the rate retention and seniority carryover for transferees that the Government urged. Before considering the arguments of the parties, analysis of what the Government is not seeking may provide perspective. Government's complaint, in the fac long-seated and utterly indefensible cial discrimination against various ployees, did not ask for back pay for employee. Nor did it seek relief for potential employee who had not h hired because of race.[11] Continuing lations having been found, the Gov ment now seeks only greater incentiv job mobility for those present employ who have been treated illegally in past. But the right of transfer or bid upward, under the Governme proposals, would not be unlimited or conditional. A transfer would only b fill vacancies; there would be no bu ing of "white" employees out of a In addition, the transferee would hav be qualified to fill the job and through the same progression as ot employees. There would be no right leapfrog over intermediate positi and bid for a job at the top. Thus, i clear that the relief sought by the G ernment is moderate.[12] In broad o line, the Government's argument is t the limited remedy of priority right transfer, ordered by the district cou does not remove the effects of past d crimination. If discriminatorily signed employees cannot keep in th new jobs their former rate of pay a seniority, few will transfer and th that do will suffer an economic pena and be forever behind their white c temporaries. In short, the reme granted below will not "insure the f enjoyment of the rights" secured by tle VII, 42 U.S.C. § 2000e–6(a).

privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. * * *

11. This characterization is true with one possible exception. The relief granted to remedy discrimination in the apprenticeship program apparently applies to blacks who applied but were never employees at the Lackawanna plant.

12. For discussions of possible remedies under Title VII, see Cooper & Sobol, *supra*, at 1632–36; Developments in the Law, *supra*, at 1163–1164, 1269.

In response to this, appellees make a number of arguments.[13] They say that there is no evidence that black members of six of the 11 departments were discriminatorily assigned or that their departments are less desirable; that even in the remaining five departments, many would have been assigned there in any event; that the scope of relief was for the discretion of the district court judge and that he did not abuse it; that alteration of the plant's seniority system is prevented by section 703(h) of Title VII; and that the Government's proposed remedy would seriously undermine morale, efficiency and safety in the plant. None but the last of these arguments requires extended discussion.

[2] The point that as to six departments there is no evidence of discrimination or that the jobs are less desirable borders on the frivolous. It is enough to say that the district court found to the contrary, and appellees have not appealed from those determinations. As to the other five departments, it is true that some of the black employees might have been assigned there even under the best of systems. But there is no apparent way of knowing that, or determining now who they would be,[14] and appellees offer none. The discrimination found illegal here was to a group; group remedy is therefore appropriate. Cf. United States v. Board of Education, 372 F. 2d 836, 866 (5th Cir. 1966), aff'd on rehearing *en banc*, 380 F.2d 385, cert. denied, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed. 2d 104 (1967).

[3] Regarding the scope of review, there apparently is a dispute between the parties with the Government claiming that we are not limited to searching for abuse of discretion. However, we do not think it necessary to resolve the issue. In denying the relief sought by the Government, Chief Judge Henderson relied in substantial part on the fact that the present seniority and transfer system was not "a complete deterrent" to transfer. 312 F.Supp. at 984. However, this puts it backwards. Even a discriminatory system that did not completely deter transfers but only discouraged them should be changed. The correct criterion in fashioning a remedy under Title VII is what would be necessary to insure sufficient incentive to transfer so that the effects of past discrimination would not be perpetuated. In addition, the test here must also look to advancement after transfer, so that an employee can achieve his "rightful place." That is, relief under the Act should give discriminated employees, as future vacancies arise, the opportunity to obtain the jobs that they would have earned had there been no discrimination. *Local 189, supra*, 416 F.2d at 988; Cooper & Sobol, *supra* at 1602–1629; Note, *supra*.

[4] Rate retention and seniority carryover have both been used to correct continuing discriminatory effects similar to those caused by the seniority and transfer provisions at the Lackawanna plant. Griggs v. Duke Power Co., [illegible] F.2d 1225, 1236–1237 (4th Cir. 1971) (seniority carryover), rev'd on other grounds, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Robinson v. Lorillard Corp., 319 F.Supp. 835, 839, [illegible] (M.D.N.C.1970) (rate retention and seniority carryover); Clark v. American Marine Corp., 304 F.Supp. 603, 608 [illegible] D.La.1969) (rate retention and seniority carryover); United States by Clark v. Local 189, United Papermakers, 301 F. Supp. 906, 919, 923 (E.D.La.) (rate retention and seniority carryover), aff'd, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L. Ed.2d 108 (1970); *Quarles, supra*, 304 F.Supp. at 521 (seniority carryover

13. For purposes of convenience in discussion, we have not treated separately the arguments of the company and the unions, although they do differ in emphasis; e. g., the company stresses the effects of the Government proposals on safety and efficiency in the plant; the union discusses the effect on other employees.

14. Appellee unions concede as much. Brief of Appellee unions at 20–21.

will remove any racially based constraints against transfer and allow the transferee, if qualified, to be promoted within a reasonable time to his "rightful place," a job in a "white" department equal to that of his white contemporary who did not suffer a discriminatory assignment, without displacing another employee from his present job. Unless some rate retention and seniority carryover is granted to a transferee, the incentive to transfer will remain low for the very reasons that the seniority and transfer provisions of the plant were found to have perpetuated discrimination. That is, a discriminatorily assigned employee will have little incentive to transfer if he loses money or job seniority by doing so. Indeed, appellees do not argue that seniority carryover and rate retention will not be an important inducement to transfer. As indicated below, they argue just the reverse, that the incentive will be too great. Therefore, since we believe that the district court used erroneous criteria in applying Title VII, the order below should be modified even under the abuse of discretion test of review.

[5] Appellees also argue that the seniority system at the plant is protected by section 703(h) of the Act, 42 U.S.C. § 2000e-2(h), quoted in note 10 *supra*, so that any alteration of seniority rights to grant the relief requested by the Government would be improper. There are a number of reasons why we decline to accept this view. The statutory exception only applies to a "bona fide" seniority system, and Bethlehem has not appealed from the basic conclusion of the district court that the seniority sy did not deserve that description. F more important, the district court's termination was, as already indica obviously correct. Moreover, relief ready granted, transfer priority for ployees in the 11 departments, is it an alteration of the seniority syst Yet, Bethlehem raises no objection this remedy even though logically i subject to the same defect as the a tional relief still sought by the Gov ment. Bethlehem also relies on porti of the legislative history of the Act which Senators Clark and Case, co-f managers of the bill in the Senate, i cated in an interpretative memoran that legislative intent was not to blacks "special seniority rights at expense of the white workers h earlier." [15] That memorandum, h ever, in focussing on formerly wh only plants, seems to say at most the seniority of a white on a job will be affected by the claims of blacks h after he was. As we make clear b in discussing the precise relief to w we believe the Government is enti the discriminatorily assigned emplo who tranafer will not receive "special niority rights" or "super-seniori Their seniority rights will be no gre than that accorded more fortunate ployees. Both groups will bid aga each other for vacancies on the basi plant-wide seniority; an earlier-h white employee will have greater sen ity than a later-hired black. In event, essentially we agree with Ju Butzner that "Congress did not int to freeze an entire generation of N

15. The interpretative memorandum stated as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. *He would not be obliged*—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, *once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.* (However where waiting lists for employment training are, prior to the effective da of the title, maintained on a discriminatory basis, the use of such lists after t title takes effect may be held an unlawful subterfuge to accomplish discrimination.) [Emphasis added.]

110 Cong.Rec. 7213 (1964). See al *id.* at 7207.

employees into discriminatory patterns that existed before the act." *Quarles, supra*, 279 F.Supp. at 516. Accord, *Local 189, supra*, 416 F.2d at 987–988. See Cooper & Sobol, *supra* at 1607–1614.

[6, 7] Appellees' last group of objections are more substantial. Appellees fear that the irresistible advantage of rate retention and seniority carryover will lead to a wholesale depopulation of the 11 departments, that dangerous, skilled jobs will be filled by incompetents increasing the injury rates, that the preferential treatment of some employees will lead to labor unrest, and that the increased cost of production will render the plant uncompetitive. In sum, appellees claim that the Government's requested relief will destroy the efficiency and safety of the Lackawanna plant and that modification of present practices and of the district court order is therefore prohibited by what has become known as the "business necessity" exception to the requirements of Title VII. That doctrine is not referred to in the Civil Rights Act of 1964, although section 703(h), quoted in note 10 *supra*, is clearly concerned with the ability of a business to continue to operate efficiently. The doctrine has been expressed as follows:

> When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose.

Local 189, supra, 416 F.2d at 989. We accept that definition, but in the context of this case the "business necessity" doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of p crimination. Clearly such a result is n correct under Title VII. Jones v. La Way Motor Freight, Inc., 431 F.2d 24 249 (10th Cir. 1970). Necessity co notes an irresistible demand. To be pr served, the seniority and transfer sy tem must not only directly foster safety and efficiency of a plant, but also be e sential to those goals. *Local 189, supra*, 416 F.2d at 989. If the legitimate en of safety and efficiency can be serv by a reasonably available alternati system with less discriminatory effect then the present policies may not be co tinued.

Thus, it is not enough that the senio ity system at the Lackawanna plant i as appellees argue, meant to insure e derly and efficient job mobility so tha "after transfer the employee will a vance in his new line of progression i an orderly manner, developing and buil ing on new skills as he moves from j to job." [16] While these are legitima non-racial business purposes that dire ly serve safety and efficiency, they a the goals of any reasonable transfer a seniority system and do not by the selves prevent its alteration. The se iority and transfer provisions at t plant have been found to perpetuate p discrimination, and the use of rate r tention and seniority carryover will s stantially eliminate these discrimina effects. Therefore, the crucial quest must be whether the basic goal of t seniority system will necessarily be fr trated by these remedies. It is perfe clear that this will not be the case. A unqualified worker need not be pro ed whether or not he is a transferee u der the district court's order. This expressly provided in the 1968 Mas Agreement and nothing in the distr court's or in our opinion alters t fact.[17] Transferees will not move

16. Brief for Appellee Bethlehem at 30.

17. Bethlehem argues that the ability requirement in the collective bargaining agreement, Art. X, § 1, 1968 Master Agreement, will not afford sufficient protection because it is too difficult to appl and because of the narrow interpretatio given to it by arbitrators under the co lective bargaining agreement. We agre that it is probably easier to advance em ployees solely on a length of service

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...ectly to high or middle level jobs nor displace workers from jobs presently held, nor jump from low to higher jobs.[18] Under the Government's proposals, a transferee has priority rights only with respect to jobs in formerly "white" departments that are not otherwise filled in the normal seniority procedures. Accordingly, transfers will be to low-skilled, entry-level jobs. A transferee will be promoted from those jobs in the normal job-by-job fashion, moving up the progression line only as a job immediately above him becomes vacant.

Appellees also argue that the morale of employees who did not suffer discrimination will suffer if rate retention and seniority carryover are ordered. But in the context of this case that possibility is not such an overriding business purpose that the relief requested must be denied. Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification. *Quarles, supra*, 279 F. Supp. at 520. Cf. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964). Indeed, appellees themselves recognized this when they provided in the 1968 Master Agreement[19] for adjustment of conflicting seniority claims in the event of the mergers of plants or departments. If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to w... the Act is directed. Cf. Monroe... Board of Commissioners, 391 U.S. ... 88 S.Ct. 1700, 20 L.Ed.2d 733 (19...

Appellees claim that rate reten... will destroy an industry wide Job Cl... fication Program,[20] but we do not ag... Exceptions to the "equal pay for e... work" doctrine have been made in ... past. When the program was first ... into effect, "red circle rates"—ano... way of describing limited rate reten... —were common because it was ag... that no employee should suffer los... pay merely because his job was cl... fied at a lower rate. The 1968 Ma... Agreement[21] provided that an empl... temporarily assigned for Bethleh... convenience to a job other than his r... lar job, when work is available to hi... his regular job, "shall receive the e... lished rate of pay" for either the te... rary job or his permanent job, whic... er is higher. The temporary rate re... tion requested here[22] is not unpr... dented either at this plant or in o... instances where Title VII relief ... been granted. See cases cited at p. 3... *supra*.

We do not say that appellees' conc... over the effects of rate retention ... seniority carryover are manufacture... advanced in bad faith. But most ... them can be met by the carefully lim... order suggested by the Governm... Thus, appellees fear that some tr... ferees, content with doing a relati... easy job at a high rate of pay, would... cline any further promotions, and ... seniority carryover would allow tr... ferees to "bump" employees from t...

quirement, but we do not accept Bethlehem's self-serving statement that enforcement of the ability requirement is useless. Its presence in the agreement indicates that one party, probably Bethlehem, thought it was useful.

18. The Government has stipulated that each job in a line of progression provides training for the next highest job.

19. Art. X, § 9.

20. Under the program, begun in 1944, ... in the steel industry are classified based on 12 specific criteria, includi... working conditions, hazards and respons... bilities. Each job is graded on a nume... ical scale and equal wages are paid f... jobs with the same classification.

21. Art. IV, § 5.

22. This relief will be temporary becau... the transferee will most likely advan... quickly to a job paying as much as ... more than his red circle rate. See 3... F.Supp. at 985.

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jobs. But, if a transferee knows that he will lose his red circle rate if he refuses a promotion, as the Government suggests, there will be little incentive to stay on a job requiring little effort but giving high pay because of rate retention. Moreover, because plant seniority will only be used in bids upward for vacancies occurring in the normal course of business, i. e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job, an employee will not be "bumped" out of his job in such situations by a transferee. Regarding displacements caused by layoffs, the Government suggests that, as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to the layoff. Although plant seniority of transferees will remain as a factor in layoffs, this suggestion will limit the speed with which a transferee can be promoted and the unsettling effects of seniority carryover during periods of layoff and recall. Other fears of appellees are based upon inaccurate assumptions, e. g., that a transferee can go into a job for which he is not qualified or that transferees will have "super-seniority." In short, upon a careful examination of the Government's proposals and the company's past practices, we conclude that the business necessity doctrine does not require denial of the proposed relief.

Appellees also rely on the decision of the Hearing Panel in the Matter of Bethlehem Steel Corporation, OFCC Dkt. No. 102–68, issued on December 18, 1970, and the decision in United States v. H. K. Porter Co., 296 F.Supp. 40 (D. C.Ala.1968), appeal docketed, No. 27,703, 5th Cir. March 14, 1969. The former concerned the seniority and transfer provisions in use at Bethlehem's Sparrows Point (Maryland) plant. Under Executive Order 11246, companies that deal with the federal government are required to include in their contracts a pledge that they will not discriminate against any employee "because of race, creed, color, or national origin."[23] The Office of Federal Contract Compliance (OFCC) of the United States Department of Labor is charged with the responsibility for assuring that this pledge is obeyed. The OFCC charged Bethlehem with violating the pledge because, *inter alia*, the seniority system at Sparrows Point perpetuated the effect of the company's prior policy of discriminatorily assigning employees. Bethlehem refused to comply with the OFCC's direction that blacks be allowed to transfer with rate retention and seniority carryover, and requested a hearing. The Hearing Panel's decision essentially agreed with the district court's opinion in this case.[24] The Panel found that the seniority system did perpetuate the effects of past discrimination but held that the rate retention and seniority carryover provisions were not appropriate relief, because of the exigencies of business necessity. One Panel member dissented on the relief issue.

We agree that the issues and facts involved in the Sparrows Point decision, although arising in the context of a compliance hearing under Executive Order 11246 rather than a Title VII suit, are similar to those in this case. For reasons stated above, however, as well as in the dissent to the Panel's decision, we do not find persuasive the Panel's analysis of the business necessity exception. The Panel found support for its conclusion in Whitfield v. United Steelworkers of America, Local 2708, 263 F.2d [illegible] (5th Cir.), cert. denied, 360 U.S. 902, 79 S.Ct. 1285, 3 L.Ed.2d 1254 (1959), and *H. K. Porter, supra*, although it did "not accept the legal reasoning and theory of the two cases," and relied heavily on the district court opinion in this case. *Whitfield* construed a union's duty of fair representation under the doctrine

23. 3 C.F.R. 339, 340 (1964–65 Comp.).

24. The Panel decision is submitted to the Secretary of Labor who, after receiving the written positions of the parties, will decide whether to adopt the Panel's conclusions.

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Steele v. Louisville & N. R. R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); its effect on the scope of relief to be granted in Title VII cases, however, has been limited by the Fifth Circuit. United States v. Hayes International Corp., 415 F.2d 1038, 1042 n. 6 (5th Cir. 1969). *H. K. Porter*, now on appeal to the Fifth Circuit, is not in accord with a majority of the decisions and has been criticized.[25] Moreover, it can be distinguished from this case. There the district court found that the seniority system did not violate Title VII because it did not perpetuate the effects of past discriminatory assignments by locking employees into their original jobs. 296 F.Supp. at 64. Also, in that case, the Government sought, *inter alia*, plant-wide bidding for jobs, relief that would avoid having transferees advance through a line of progression of functionally interrelated jobs, each one providing training for the next. In this case, however, the remedy sought would not allow a transferee to leapfrog over jobs in a line of progression.

IV.

[8, 9] Accordingly, we believe that the relief requested by the Government with regard to seniority carryover and rate retention should have been granted. The Government also raises three other issues on appeal. It claims that the district court should have extended the relief to employees who had been discriminatorily assigned to the 11 departments but thereafter had exercised their limited right to transfer and, therefore, are not within the scope of the order. We agree. These employees originally suffered the same discrimination as those who have not transferred. They should not be denied remedial relief, either as to rate retention or as to seniority merely because they were not completely deterred from transferring. They still suffer the effects of discrimination because they are unable to reach the same level as their white contemporaries. *Quarles, supra*, 279 F.Supp. at 521.

[10] Second, the Government c tends that it was error for the dist court to extend relief to white employ in the 11 departments, who the dist court found were also discriminato assigned before October 1, 1967. court justified this finding by cit some evidence which showed at m that at some indeterminate time in past certain ethnic groups congrega in certain departments because the m in charge "tended to hire * * * p ple who were friends of his or from ethnic community * * *." This far short of proof that any of the wh employees in the 11 departments w there because they could not obtain j elsewhere in the plant. In brief, th was simply insufficient evidence to s port the district court's finding that of the whites in the 11 departme were ever the victims of discriminat prohibited by Title VII.

[11] Finally, the Government arg that paragraph 7 of the district cou order was error insofar as it exten relief to white applicants who were nied entry to the apprenticeship p gram during the period January 1, 1 to October 1, 1967, and who were least as qualified as the least qualif white accepted during that same per Based on the stipulated facts, the d trict court entered a pre-trial order s ting forth the relief, agreed to by Government and Bethlehem, that was be included in the final decree of perm nent injunction. Although the pre-t order relief based upon the discrimi tion in the apprenticeship program plied to "[e]ach Negro applicant for apprenticeship," the final order app to "[e]ach applicant." We agree w the Government that no reason was g en for the change and that there was proof that Bethlehem rejected any wh applicants to the apprenticeship progr on the basis of "religion, sex, or natio origin." Accordingly, paragraph 7

25. E. g. Cooper & Sobol, *supra* at 1022-1023, 1025-1026.

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the district court's order should apply only to rejected black applicants.

V.

In conclusion, the objective of the order to be entered here must be to remove the discriminatory effects of a transfer and seniority system that violated the Act. Appellees have not shown that the system in use at the Lackawanna plant is so essential to safety and efficiency that it cannot be modified in the ways suggested by the Government. On the contrary, a carefully drawn order providing for rate retention and seniority carryover can protect both the rights of employees who have suffered discrimination as well as the legitimate business interests of the appellants.

An appropriate order here should grant an employee who has been discriminated against ("a transferee"), at least the following additional relief: (1) A transferee shall receive, in his new position, pay equal to the pay in his former permanent position and shall continue to be so paid until he reaches a position whose pay scale is greater. If no job in his new department or unit has a rate as high as his former position, then he shall receive the rate of the highest level job in that department or unit. Because the rate retained is that of the transferee's permanent job, he shall not retain any temporary pay increase if he transfers after a temporary promotion. (2) A transferee shall be permitted to exercise plant seniority for all purposes following transfer, except as otherwise set forth herein. When a transferee competes on the basis of seniority for vacancies occurring in the normal course of business, seniority for all bidders shall be computed on the basis of plant, rather than unit or department, seniority. Only workers qualified to fill a higher job may use plant seniority to advance. As workers are recalled after a layoff, all employees shall assume the same positions relative to each other as they held immediately prior to the layoff. (3) A transferee's right to transfer with seniority carryover and rate retention may be exercised only once, and only during the next two years. If he exercises that right within that period, the transferee's protection of seniority carryover and rate retention shall continue in accordance with the other provisions in the order. (4) A transferee shall lose his privilege of rate retention if he refuses a promotion in his new unit or department.[26]

While the district court order, so modified, may cause inconvenience or annoyance, we believe that it will not disrupt the safety and efficiency of the Lackawanna plant. Because a transferee will have only one opportunity of limited duration to transfer to a formerly "white" department, the Lackawanna plant will not be thrown into a chaotic game of musical chairs. There will be no right to transfer on an "hour-to-hour and day-to-day basis," as appellees fear. Nor will any employee have superseniority or be entitled to a job for which he is not qualified. But the order so modified will give an employee who has suffered discrimination the opportunity to reach his "rightful place" in the plant. That result will accord with the noble purpose of the Civil Rights Act of 1964 to eradicate racial discrimination in employment in the north as well as in the south. We believe that the order as modified is reasonably designed to accomplish that end and is necessary to its fulfillment.

Case remanded for entry of a new order consistent with this opinion.

26. Of course, we do not preclude the parties from agreeing to other changes in the order or the district court from changing the order in other respects for purposes of clarification.

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UNITED STATES of America, by Ramsey CLARK, Attorney General, Plaintiff,

v.

BETHLEHEM STEEL CORPORATION, a corporation, Local 2601, United Steelworkers of America, Local 2602, United Steelworkers of America, Local 2603, United Steelworkers of America, Local 2604, United Steelworkers of America, Local 3144, United Steelworkers of America, and the United Steelworkers of America, Defendants.

Civ. 1967-432.

United States District Court, W. D. New York.

April 13, 1970.

Action against steel company and union for relief against racially discriminatory employment practices. The District Court, John O. Henderson, Chief Judge, held that steel company and union which had engaged in racially discriminatory job assignment, reenforced by transfer and seniority practices which tended to lock Negroes into less desirable jobs, would be required to afford right to transfer to all employees on basis of seniority, without rate retention or seniority carry-over, and to reduce number of transfer "pools".

Order accordingly.

1. Civil Rights ⇐3

Steel plant's apprenticeship system making employment opportunity contingent upon status which Negroes were formerly prevented from achieving, due to prior discriminatory job assignment, was discriminatory in violation of Civil Rights Act of 1964, while system might properly be applied to plant department to which Negroes were commonly assigned. Civil Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S.C.A. §§ 2000e et seq., 2000e-6(a).

2. Labor Relations ⇐179

Even if union membership had voted to retain no-transfer provision in seniority agreement, union would still have had duty to negotiate system that would alleviate racially discriminatory assignment patterns.

3. Labor Relations ⇐221

Union which had notice of steel plant's racially discriminatory practices in job assignment and transfer had duty to take whatever steps were lawful to alleviate discrimination and effects of discrimination upon its Negro members.

4. Civil Rights ⇐3

Upon showing that steel company and union had taken steps, with respect to transfer among seniority units in coke ovens department, which extended company's prior discriminatory practices, court would order that persons in least desirable units be offered first opportunities to transfer to vacancies in other units based upon department seniority, taking entry level jobs. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e-2(h).

5. Civil Rights ⇐3

Steel company's conduct, before enactment of 1964 Civil Rights Act, with respect to racial discrimination in job assignment and transfer, could be considered in determining whether present practices of company and union were illegal or tended to perpetuate past discriminatory practices, especially where policies which appeared to be racially neutral were claimed to be part of pattern or practice of discrimination. Civil Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S.C.A. §§ 2000e et seq., 2000e-6(a).

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6. Civil Rights ⇐3

Where Civil Rights Act provisions relating to employment discrimination are violated, racially neutral practices may be prohibited or changed because they build upon foundation of pre-Act discrimination and tend to have present discriminatory effects. Civil Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–6(a).

7. Injunction ⇐127

Evidence of statistical probability may be considered by finder of fact in determining questions presented in action to enjoin alleged employment discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐3

Where discriminatory employment practices were admitted and continued beyond effective date of 1964 Civil Rights Act, court may alter by decree seniority system which itself may be racially neutral on its face, even though system developed without regard to racial considerations. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e–2(h).

9. Civil Rights ⇐3

It is not necessary to prove that intention to discriminate existed at time of allegedly discriminatory employment practices, and all that is necessary to prove intention is demonstration that conduct is not accidental, inadvertent, or heedless, or arises from mistake. Civil Rights Act of 1964, §§ 701 et seq., 707(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–6(a).

10. Civil Rights ⇐3

"Bona fide", within 1964 Civil Rights Act provision exempting variance in conditions of employment pursuant to bona fide seniority system, does not exempt from adjustment seniority system based on discriminatory practices where proof shows violation of Act after its effective date and seniority system perpetuates effects of discrimination. Civil Rights Act of 1964, § 703(h), U.S.C.A. § 2000e–2(h).

See publication Words and Phrases for other judicial constructions and definitions.

11. Civil Rights ⇐13

In action against steel company a union for relief against racially d criminatory employment practices wh preceded and followed effective date Civil Rights Act, court was empowe to fashion decree to correct present e fect of past discrimination, while anti pating collateral effects so as to avoid equities. Civil Rights Act of 1964, 707(a), 42 U.S.C.A. § 2000e–6(a).

12. Civil Rights ⇐13

That Attorney General, for pra tical results, had limited his Civil Rig Act case to Negroes did not requ that court be so limited in providing lief. Civil Rights Act of 1964, § 70 seq., 42 U.S.C.A. § 2000e et seq.

13. Civil Rights ⇐3

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Thomas E. Krug, Buffalo, N. Y., for defendant Local Unions Nos. 2601, 2602, 2603, 2604 and 3144.

JOHN O. HENDERSON, Chief Judge.

This case involves violations of the equal employment provisions (Title VII) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). The United States charged the Bethlehem Steel Corporation and, in an amended complaint the United Steelworkers of America and local unions of the United Steelworkers, with engaging in a "pattern or practice" of racial discrimination in their employment practices at Bethlehem Steel Corporation's Lackawanna Plant (hereinafter "Plant").

Most of the facts were stipulated.* Bethlehem admitted discrimination against Negroes in most phases of its employment practice and much of the relief requested by the government was agreed to and entered as part of the pre-trial order.

Bethlehem Steel Corporation's Lackawanna Plant is its second largest steel plant—the fourth largest in the country. Its normal working force consists of about 18,000 people with an annual payroll of around 135 million (DC Ex. 1, p. 10).

DISCRIMINATION IN GENERAL HIRING AND ASSIGNMENT PROCEDURES

The admitted activity of the company regarding its discriminatory employment practices creates a sorry image.

Until September 1967, the Plant did not uniformly apply objective standards and procedures for the hiring and assignment of new employees. Bethlehem has admitted, for example, that the Plant's employment office falsely raised the general aptitude test scores of some white applicants, hired some white applicants without testing, granted preferential treatment to white applicants for summer employment and, in general, provided employment opportunities to white applicants which were not generally provided to Negro applicants. For example, as mentioned below, the Supervisor of Employment consistently preferred residents of Angola, an all-white suburb, for employment opportunity. The Plant also followed a practice of generally assigning Negroes to the hotter, dirtier and less desirable jobs and departments and not assigning Negroes to other jobs and departments to which white employees have been traditionally assigned. In those instances where Negroes were initially assigned by the personnel department to traditionally white departments, they were discriminatorily rejected by supervisory personnel in those departments. The Supervisor of Employment believed that Negroes could stand heat better than whites.

Further detailing of the admissions contained in the stipulations serves no useful purpose but the court finds as fact the facts as set forth in the stipulations of July 18, 1968 and September 23, 1968. The court will now turn to the specific policies of discrimination which were practiced at the Bethlehem Plant.

It has been admitted that the company discriminated in hiring and assignment of employees until October 1, 1967. Until that time, the employment office at the Plant, through the Supervisor of Employment and the clerk interviewers, had the power to reject applications for employment with almost absolute discretion. Moreover, it is admitted that prior to October 1, 1967, the Plant failed to implement fixed and reasonably objective standards and procedures for hires; the employment officers, by falsely raising aptitude test scores of some white applicants, failing to test some white

* One stipulation of facts was filed with the court on July 18, 1968, and hereinafter will be referred to as Stip. # 1. A second stipulation of facts was filed September 23, 1968, and will be referred to hereinafter as Stip. # 2. This court's pre-trial order of September 24, 1968, found stipulation # 1, except ¶ 13 (b), (d) and (e) to which stipulations the unions did not acquiesce, as facts